

08/15/2024

Chad Finke, Executive Officer / Clerk of the Court

By: S. Iyamu Deputy

PETER ELIASBERG (SBN 189110)  
peliasberg@aclusocal.org  
JONATHAN MARKOVITZ (SBN 301767)  
jmarkovitz@aclusocal.org  
AMERICAN CIVIL LIBERTIES UNION  
FOUNDATION OF SOUTHERN CALIFORNIA  
1313 W 8th Street  
Los Angeles, CA 90017  
Telephone: (213) 977-9500  
Facsimile: (213) 915-0219

SHAILA NATHU (SBN 314203)  
snathu@aclunc.org  
ANGELICA SALCEDA (SBN 296152)  
asalceda@aclunc.org  
CHESSIE THACHER (SBN 296767)  
cthacher@aclunc.org  
AMERICAN CIVIL LIBERTIES UNION  
FOUNDATION OF NORTHERN CALIFORNIA  
39 Drumm Street  
San Francisco, CA 94111  
Telephone: (415) 621-2493  
Facsimile: (415) 255-1478  
(Additional Counsel for Amici on Following Page)

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

M.A.; A.D.C.C.; Z.H.; L.R.; and Z.S.

Plaintiffs and Petitioners,

v.

REGENTS OF THE UNIVERSITY OF  
CALIFORNIA and HOWARD GILLMAN, IN  
HIS OFFICIAL CAPACITY AS THE  
CHANCELLOR, UNIVERSITY OF  
CALIFORNIA, IRVINE

Defendants and Respondents.

Case No. 24CV085280

**[Proposed] Amicus Brief on Behalf of  
AMERICAN CIVIL LIBERTIES UNION  
OF SOUTHERN CALIFORNIA, INC.,  
AMERICAN CIVIL LIBERTIES UNION  
OF NORTHERN CALIFORNIA, INC., and  
AMERICAN CIVIL LIBERTIES UNION  
OF SAN DIEGO & IMPERIAL  
COUNTIES in support of Plaintiffs and  
Petitioners' Motion for a Stay of  
Administrative Decision**

Dept: 23

Judge: Hon. Michael M. Markman

Motion for Stay Filed: August. 13, 2024

1 EFAON COBB (SBN 282228)  
2 ecobb@aclu-sdic.org  
3 ACLU FOUNDATION OF SAN DIEGO & IMPERIAL COUNTIES  
4 P.O. Box 87131  
5 San Diego, California 92138-7131  
6 Telephone: (619) 398-4498  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

## Table of Contents

I.	INTRODUCTION .....	6
II.	ARGUMENT .....	7
A.	The University Violated Due Process by Disregarding its Own Policies and Imposing Interim Suspensions in the Absence of a Serious Threat to Safety or of Disruption and by Failing to Tailor the Suspensions to Avoid Unnecessary Restrictions on Students' Ability to Function as Part of the University Community .....	7
1.	The University Violated its Own Policies by Imposing Wholesale Interim Suspensions on Dozens of Student Protesters Without Any Individualized Basis for Believing the Students Posed a Threat to Safety or of Serious Disruption .....	8
2.	The University Committed Further Violations of its Own Policies by Imposing Sweeping Suspensions that Restricted Students' Ability to Participate in Campus Life to a Far Greater Extent Than Necessary to Protect Against Any Reasonably Foreseeable Threat to Safety or of Disruption.....	9
B.	The University Violated Due Process by Failing to Provide Students Any Opportunity to Explain Their Actions Before Imposing Interim Suspensions, Even Though Their Presence on Campus Did Not Present a Threat to Safety or of Serious Disruption. ....	10
C.	The University Compounded its Initial Due Process Violations by Sustaining the Interim Suspensions in Sham Hearings that Relied Either on No Evidence or On Secret Evidence that Was Never Provided or Explained to the Students.....	11
III.	CONCLUSION .....	15

## TABLE OF AUTHORITIES

**Page(s)**

### **Cases**

<i>Berman v. Regents of Univ. of Cal.</i> , 229 Cal. App. 4th 1265 .....	7
<i>Bonn v. Cal. State Univ., Chico</i> , 88 Cal. App. 3d 985 (1979) .....	8
<i>Braxton v. Mun. Ct.</i> , 10 Cal. 3d 138 (1973) .....	11
<i>Buckingham v. Sec’y of U.S. Dep’t of Agric.</i> , 603 F.3d 1073 (9th Cir. 2010) .....	11
<i>California Tchrs. Ass’n v. State of Cal.</i> 20 Cal. 4th 327 (1999) .....	12
<i>Doe v. Regents of Univ. of Cal.</i> , 5 Cal. App. 5th 1055 (2016) .....	7
<i>Doe v. Regents of Univ. of Cal.</i> , 28 Cal. App. 5th 44 (2018) .....	15
<i>Doe v. Univ. of S. Cal.</i> , 246 Cal. App. 4th 221 (2016) .....	7, 10
<i>Goss v. Lopez</i> , 419 U.S. 565 (1975) .....	7, 11, 14
<i>Grayned v. City of Rockford</i> , 408 U.S. 104 (1972) .....	13, 14, 16
<i>Karasek v. Regents of Univ. of Cal.</i> , 956 F.3d 1093 (9th Cir. 2020) .....	8, 10
<i>Kaur v. Holder</i> , 561 F.3d 957 (9th Cir. 2009) .....	15
<i>Knight v. S. Orange Cmty. Coll. Dist.</i> , 60 Cal. App. 5th 854 (2021) .....	7, 11, 13, 14
<i>Lee v. Weisman</i> , 505 U.S. 577 (1992) .....	13
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976) .....	12, 13, 14

1	<i>Pawlyk v. Wood</i> ,	
2	248 F.3d 815 (9th Cir. 2001) .....	15
3	<i>Yagman v. Garcetti</i> ,	
4	852 F.3d 859 (9th Cir. 2017) .....	11, 12
5	<b>Statutes</b>	
6	Penal Code section 626.4.....	11
7	<b>Constitutional Regulations</b>	
8	California Constitution Speech Clause .....	13
9	First Amendment .....	13, 15
10	Fourteenth Amendment .....	7
11	<b>Other Authorities</b>	
12	California’s “Policies Applying to Campus Activities, Organizations and Students”	
13	<a href="https://policy.ucop.edu/doc/2710530/PACAOS-100">https://policy.ucop.edu/doc/2710530/PACAOS-100</a> .....	8, 9, 10, 12

## I. INTRODUCTION

The term “interim suspensions” may sound relatively benign – certainly as compared to full suspensions or expulsions. But any innocuous connotation the term might carry would belie the severity of a disciplinary mechanism that can have severe and life-long consequences for students. There may be times when interim suspensions serve as strong – but appropriate – medicine that universities can administer to address serious disciplinary problems that might threaten the safety of members of the university community or severely disrupt campus activity. But they can only do so by cutting students off from both their education and community. Unfortunately, the expediency of interim suspensions is directly – and inversely – proportional to their precision. By definition, interim suspensions are imposed before university administrators complete full investigations into alleged student misconduct. Consequently, they inevitably pose a risk that students will be subjected to serious deprivations – including, at least, being removed from classes and temporarily denied the ability to continue to pursue their education – based on erroneous early assessments made before all the facts are in. For this reason, they ought to be imposed only with extreme caution – strong medicine can turn poisonous when administered indiscriminately and without careful adherence to procedural safeguards. That is precisely what has happened here.

When the University of California, Irvine imposed interim suspensions on student members of the Palestinian solidarity movement, it violated due process in numerous ways. It disregarded its own policies, failed to provide proper notice to the students of the specific misconduct it alleged they had engaged in, refused to produce or even explain the evidence arrayed against them, and imposed sweeping and draconian restrictions on their participation in campus life. These restrictions included barring students from their own homes in University housing, preventing them from completing their course work, and prohibiting them from attending their own graduations after years of study.

In the absence of due process, the interim suspensions appear arbitrary at best. At worst, in a case like this, they can give rise to credible accusations that the University is targeting speech it disfavors. Either way, and regardless of the University’s intent, the suspensions are likely to chill students’ ability to exercise their free speech rights and engage in protected speech because the lack of due process means that students can never know when a university administrator will decide that their protest

1 activity has crossed an imperceptible line into serious misconduct, or whether or when they will have  
2 any real opportunity to defend themselves against false allegations.

3 The Court should order the University to lift the interim suspensions because they are tainted by  
4 due process violations and because allowing them to remain in place while the University completes its  
5 misconduct investigations will only exacerbate this chill on constitutionally protected free speech  
6 activity.

## 7 **II. ARGUMENT**

### 8 **A. The University Violated Due Process by Disregarding its Own Policies and Imposing** 9 **Interim Suspensions in the Absence of a Serious Threat to Safety or of Disruption** 10 **and by Failing to Tailor the Suspensions to Avoid Unnecessary Restrictions on** 11 **Students' Ability to Function as Part of the University Community.**

12 As a public institution, the University must abide by the Due Process Clause of the Fourteenth  
13 Amendment, which provides that no state shall “deprive any person of life, liberty, or property, without  
14 due process of law.” U.S. Const. amend. XIV, § 1. “Students facing temporary suspension have interests  
15 qualifying for protection of the Due Process Clause, and due process requires, in connection with a  
16 suspension of 10 days or less, that the student be given oral or written notice of the charges against him  
17 and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present  
18 his side of the story. The Clause requires at least these rudimentary precautions against unfair or  
19 mistaken findings of misconduct and arbitrary exclusion from school.” *Goss v. Lopez*, 419 U.S. 565, 581  
20 (1975); *see also Knight v. S. Orange Cmty. Coll. Dist.*, 60 Cal. App. 5th 854, 864–66 (2021) (applying  
21 *Goss*, which addressed suspensions of elementary school students, to post-secondary education, and  
22 concluding that “notice of the charges and of the evidence and an opportunity to state the student’s side  
23 of the story: is clearly ... required before a suspension of 10 days or less may be imposed” while noting  
24 that students have a “due process right to a hearing” including “witnesses and cross-examination” for  
25 suspensions of longer duration).

26 A bedrock rule of due process in higher education is that “[w]here student discipline is at issue,  
27 the university must comply with its own policies and procedures.” *Doe v. Regents of Univ. of Cal.*, 5  
28 Cal. App. 5th 1055, 1073 (2016); *see also Doe v. Univ. of S. Cal.*, 246 Cal. App. 4th 221, 239 (2016)  
(same); *Berman v. Regents of Univ. of Cal.*, 229 Cal. App. 4th 1265, 1271(2014). And, as an

administrative agency, the University of California is “bound by its own regulations.” *Bonn v. Cal. State Univ., Chico*, 88 Cal. App. 3d 985, 990 (1979). When the University imposed interim suspensions on students involved in the Palestinian solidarity movement, it bypassed its written policies and procedures by imposing sanctions without adequate justification and failing to structure the suspensions in ways that could reduce harm to the suspended students.

*1. The University Violated its Own Policies by Imposing Wholesale Interim Suspensions on Dozens of Student Protesters Without Any Individualized Basis for Believing the Students Posed a Threat to Safety or of Serious Disruption.*

Under the University of California’s “Policies Applying to Campus Activities, Organizations and Students” (“PACAOS”), interim suspensions are appropriate only “when there is reasonable cause to believe that the student’s participation in University activities or presence at specified areas of the campus will lead to physical abuse, threats of violence, or conduct that threatens the health or safety of any person on University property or at official University functions, or other disruptive activity incompatible with the orderly operation of the campus.” PACAOS § 105.08.<sup>1</sup> The plain language of section 105.08 makes clear that interim suspensions are not intended as punishment for past actions but are instead meant to guard against the threat of *future* violence or serious disruption posed by students whose presence “*will*” produce such problems. This understanding of section 105.08 is also reflected in case law. *See, e.g., Karasek v. Regents of Univ. of Cal.*, 956 F.3d 1093, 1110 (9th Cir. 2020) (holding that the University of California had not acted with deliberate indifference to allegations of sexual assault because it had placed one of the alleged assailants—who was also charged with felony sexual assault—on interim suspension and barred him from campus to protect his victim during a period pending an investigation into the accusations). To date, to the best of our knowledge, the University has made no effort to demonstrate a good faith basis for any possible “reasonable cause to believe” that the suspended students posed any such threat at the time they were suspended.

The suspended students are part of a non-violent protest movement. While one of them is alleged to have struggled against police (presumably during the heat of the moment as officers were clearing the protesters’ Palestinian solidarity encampment), the interim suspension notices and notices sustaining the interim suspensions provide no other allegations that the petitioners/plaintiffs (hereafter “plaintiffs”) in

---

<sup>1</sup> The policies are available at <https://policy.ucop.edu/doc/2710530/PACAOS-100>.



1 this case ever physically abused anyone on campus, that they threatened violence or anyone's health or  
2 safety on University property or at University functions, much less that they threatened to do so *again*.  
3 And, even assuming, *arguendo*, that some of their actions may have been "disruptive," and even *so*  
4 disruptive as to have been "incompatible with the orderly operation of the campus," the University has  
5 made no showing at all to support a reasonable belief that their continued presence on campus would  
6 pose a similar threat going forward. Indeed, only one of the decision letters sustaining the interim  
7 suspensions even mentions the administration's concerns about future violations. Petition Exhibit C.

8 In sum, the university's own policies demonstrate that interim suspensions are extraordinary  
9 measures that are meant to be imposed only on students whose continued presence on campus can be  
10 reasonably expected to create future serious harm to members of the campus community or to the  
11 orderly operations of campus activities. They cannot be imposed as a method of punishment for past  
12 actions, as appears to be the case here.

13 2. *The University Committed Further Violations of its Own Policies by Imposing Sweeping*  
14 *Suspensions that Restricted Students' Ability to Participate in Campus Life to a Far Greater*  
15 *Extent Than Necessary to Protect Against Any Reasonably Foreseeable Threat to Safety or of*  
*Disruption.*

16 In the fairly extraordinary situation where the University has a reasonable basis to conclude that  
17 a student's mere presence on campus poses a threat to safety or of serious disruption, the University may  
18 "restrict[]" that student, but "only to the minimum extent necessary" to abate the threat. PACAOS §  
19 105.08. Thus, the University must consider less restrictive measures for each student, such as warnings  
20 or censure, probation, loss of privileges and activities, exclusion from specified areas on campus,  
21 community service, and fines, as stated in its own policies. PACAOS, §§ 105.01, 105.03, 105.04,  
22 105.09, 105.11. The requirement to tailor a student's interim suspension in this manner ensures, or  
23 should ensure, that a student is not subjected to potentially life-altering discipline (such as being  
24 prohibited from completing course work and graduating, or even becoming temporarily unhoused when  
25 barred from their university housing) before a full adjudication of the case against them, unless there is  
26 no other way to ensure safety and prevent severe disruption to the ordinary functioning of the university.  
27 Here, the University has made virtually no effort to tailor the suspensions and it has instead needlessly  
28 restricted its students in a severe and blanket fashion.

1 The students who received interim suspension notices on May 8, 2024 were told “not [to]  
2 appear, physically or virtually, on the UCI campus, or at any location where UCI classes or programs  
3 sponsored by UCI are taking place, including online classes, for the duration of the imposed Interim  
4 Suspension.” Petition ¶ 41 and Exhibits A and B. Defendants also banned them from University  
5 housing. *Id.* The students who received interim suspension notices on May 21, 2024 were subject to the  
6 same sweeping bans, except that they were not subjected to a “virtual” ban and were permitted to  
7 maintain access to electronic resources needed to perform their University assigned employment  
8 remotely.” *Id.* ¶ 52 and Exhibits C, D, and E. The interim suspensions that the University imposed in  
9 response to car caravan protests on June 4, 2024 and June 14, 2024, are alleged to have been “as broad  
10 as possible, excluding students from the entire campus, both physically and ‘virtual[ly], like the May 8  
11 suspensions. Otherwise, the terms were identical to the prior interim suspensions.” *Id.* ¶ 61.

12 The fact that all of these suspensions were nearly identical (except for allowing virtual  
13 participation for some students) betrays a lack of effort on the part of the University to tailor the  
14 suspensions to restrict individual students “only to the minimum extent necessary” to abate the threat  
15 they might have posed. PACAOS § 105.08. There may be circumstances where it is appropriate and  
16 necessary to ban a student from every part of campus, as when he is accused of sexual assault and his  
17 alleged victim is still enrolled in classes. *See Karasek*, 956 F.3d at 1110. But those circumstances are not  
18 present here. There is no safety justification, for example, for preventing someone who participated in a  
19 protest next to a lecture hall from returning to their University housing, thereby likely causing the  
20 student to become at least temporarily unhoused, with all of the concomitant risks that status poses to  
21 their safety and well-being. The University’s failure to appropriately tailor the interim suspensions is  
22 another way that it has failed to “comply with its own policies and procedures,” thus violating students’  
23 due process rights. *Doe*, 246 Cal. App. 4th at 239.

24  
25 **B. The University Violated Due Process by Failing to Provide Students Any**  
26 **Opportunity to Explain Their Actions Before Imposing Interim Suspensions, Even**  
**Though Their Presence on Campus Did Not Present a Threat to Safety or of Serious**  
**Disruption.**

27 There may be times where it is impractical for administrators to take the time to explain the  
28 evidence that supports an interim suspension or to afford a student the opportunity to present their side

1 of the story before removing the student from campus because the student’s presence presents an  
2 immediate and overwhelming threat to others. *See, e.g., Braxton v. Mun. Ct.*, 10 Cal. 3d 138, 145  
3 (1973) (holding that students may be ordered off campus pursuant to Penal Code section 626.4 even  
4 without “notice and a hearing on alleged misconduct” if an “administrator reasonably finds that the  
5 situation is such an exigent one that the [student’s] continued presence on the campus . . . constitutes a  
6 substantial and material threat of significant injury to persons or property.”); *see also Goss*, 419 U.S. at  
7 582 (holding that “prior notice and hearing cannot be insisted upon” before removing students from  
8 school if their “presence poses a continuing danger to persons or property or an ongoing threat of  
9 disrupting the academic process.”). Here, however, no such “exigent” circumstances existed at the time  
10 the interim suspensions were imposed. Again, the University has made no showing that any of the  
11 plaintiffs’ continued presence on campus posed any ongoing threat to safety or of disruption that was so  
12 severe and immediate as to warrant setting aside the most basic procedural protections that can  
13 “provide a meaningful hedge against erroneous action” and that can ensure “the risk of error [will be]  
14 substantially reduced.” *Goss*, 419 U.S. at 583. The University’s decision to impose the interim  
15 suspensions without first appraising the students of the evidence against them and giving them a chance  
16 to “present [their] side of the story” therefore violated their due process rights. *Id.* at 580.

17 **C. The University Compounded its Initial Due Process Violations by Sustaining the**  
18 **Interim Suspensions in Sham Hearings that Relied Either on No Evidence or On**  
19 **Secret Evidence that Was Never Provided or Explained to the Students.**

20 “The base requirement of the Due Process Clause is that a person deprived of property be given  
21 an opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *Buckingham v. Sec’y of*  
22 *U.S. Dep’t of Agric.*, 603 F.3d 1073, 1082 (9th Cir. 2010) (citation and internal quotation marks  
23 omitted). “This principle does not always require a full evidentiary hearing or a formal hearing . . . [but]  
24 the Supreme Court has held . . . that usually ‘the Constitution requires *some kind of . . . hearing* before  
25 the State deprives a person of liberty or property.’” *Yagman v. Garcetti*, 852 F.3d 859, 864 (9th Cir.  
26 2017) (citation and quotation marks omitted). There is no question this basic principle applies to school  
suspensions. *Knight*, 60 Cal. App. 5th at 870.

27 Once a university completes its investigation into allegations of student misconduct and informs  
28 a student that it is considering suspension, the student must be given an opportunity to object to the

1 suspension. *Id.* If the student does object, “then there must be a hearing, live testimony, and the full  
2 panoply of trial-like procedures.” *Id.* While this level of due process is required only before a full  
3 suspension is imposed on an objecting student, *id.*, even an interim suspension can entail a significant  
4 deprivation, and therefore requires “*some kind*” of hearing. *Yagman*, 852 F.3d at 864. The University’s  
5 own policies recognize this requirement and therefore provide that “[a] student placed on Interim  
6 Suspension shall be given prompt notice of the charges, the duration of the Interim Suspension, and the  
7 opportunity for a prompt hearing on the Interim Suspension.” PACAOS § 105.08.

8         The University student conduct and discipline policies do not specify the type of hearing that is  
9 required before the University may sustain an interim suspension. However, even a “predeprivation  
10 hearing . . . [which] need not be elaborate” must at minimum provide that the plaintiff be “accorded oral  
11 or written notice of the charges against him, an explanation of the adverse evidence, and an opportunity  
12 to present his side of the story.” *Yagman*, 852 F.3d at 864 (cleaned up, citations and quotation marks  
13 omitted). The University has failed to meet that most basic due process standard here. It is unclear what  
14 evidence, if any, the University relied on to sustain the interim suspensions after the “hearings,” as they  
15 did not present or explain the evidence in the interim suspension notices or present it in the hearings.  
16 Without an “explanation of the adverse evidence” that might justify the suspensions, students were  
17 unable to meaningfully tell their “side of the story”—they did not have any opportunity to know what  
18 story was being told about them, or how to contest it. *Id.* The University’s failure to even describe the  
19 evidence arrayed against the students ensured that the meetings held to review the interim suspensions  
20 cannot, in fact, be considered true “hearings” by any meaningful definition of the term.

21         While courts have not specified the exact type of hearing required to sustain an interim  
22 suspension, fundamental due process principles provide some guidance. Generally, a court must  
23 consider three factors in determining what process is due: “First, the private interest that will be affected  
24 by the official action; second, the risk of an erroneous deprivation of such interest through the  
25 procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and  
26 finally, the Government’s interest, including the function involved and the fiscal and administrative  
27 burdens that the additional or substitute procedural requirement would entail.” *Mathews v. Eldridge*, 424  
28 U.S. 319, 335 (1976); *see also California Tchrs. Ass’n v. State of Cal.*, 20 Cal. 4th 327, 347 (1999)

1 (“The balancing analysis set forth in cases such as *Mathews v. Eldridge* . . . requires an examination of  
2 procedures to determine whether they assure a minimum *overall* standard of fairness in the particular  
3 context.”) (original emphasis).

4         Here, it may be tempting to conclude that the “private interest” affected by sustaining an interim  
5 suspension is relatively minor, as it is only one step in a longer process, and a full suspension could only  
6 be imposed after a thorough investigation and hearing. This conclusion would be a mistake, however,  
7 because the interim suspensions the University imposed are so sweeping and because they are of  
8 indefinite duration, having already lasted two or three months, with no clear end in sight. For students  
9 barred from their University housing and unable to complete coursework or graduate, the stakes and  
10 harm of the interim suspensions are quite high. As the Supreme Court has emphasized, “[e]veryone  
11 knows that in our society and in our culture high school graduation is one of life's most significant  
12 occasions. . . . Graduation is a time for family and those closest to the student to celebrate success and  
13 express mutual wishes of gratitude and respect.” *Lee v. Weisman*, 505 U.S. 577, 595 (1992). The ability  
14 to attend university or college graduations, which mark even higher levels of achievement, is no less  
15 meaningful.

16         Even suspensions that last only “10 days or less” require universities to provide students with  
17 “notice of the charges and of the evidence and an opportunity to state the student’s side of the story.”  
18 *Knight*, 60 Cal. App. 5th at 864–66. Students have a “due process right to a hearing” including  
19 “witnesses and cross-examination” for suspensions of longer duration. *Id.* Referring to the suspensions  
20 that have been imposed here as “Interim” does not change the fact that they have passed that ten-day  
21 threshold multiple times over.

22         The private interest here is particularly high because imposing severe disciplinary measures on  
23 student protesters without clear standards and adequate justification can deter students from exercising  
24 their rights under the First Amendment and the Liberty of Speech Clause of the California Constitution.  
25 When student protesters are punished without knowing the reasons or evidence that against them, they  
26 may be left guessing about what protest activity are acceptable and where they may cross a line. This  
27 lack of clarity can chill speech because “[u]ncertain meanings inevitably lead citizens to ‘steer far wider  
28 of the unlawful zone’ . . . than if the boundaries of the forbidden areas were clearly marked.” *Grayned v.*

1 *City of Rockford*, 408 U.S. 104, 109 (1972). The interim suspension notices sent to the plaintiffs here  
2 provided only vague and conclusory allegations, including almost identical boilerplate lists of alleged  
3 offenses (such as “engaged in disorderly conduct”) without any individualized explanation of what,  
4 precisely, the student allegedly did to commit those offenses. The notices and subsequent proceedings  
5 did little to mark the “boundaries of the forbidden areas.” *Id.*; *see also* Petition Exhibits A-E.

6 This notice failure, coupled with the University’s refusal to explain the evidence supporting  
7 allegations of misconduct, prevents students from obtaining any real guidance on how to avoid  
8 reoffending (even assuming they offended in the first place). Plaintiffs or other students who observe  
9 this punishment and lack of clarity and who wish to be able to continue their academic pursuits are  
10 likely to “steer far wider” of any kind of protected protest activity than they might otherwise. *Grayned*,  
11 408 U.S. at 109.

12 The risk of an erroneous deprivation is also quite high here, as students were never afforded an  
13 opportunity to “present [their] side of the story,” *Goss*, 419 U.S. at 581, before the University imposed  
14 the interim suspensions. *See* Petition Exhibits A-E. Because Defendants did not tell the students what  
15 evidence existed against them, the administrator who sustained the interim suspensions may well have  
16 done so while relying on an incomplete record or on interpretations of evidence that might have changed  
17 had the evidence been tested and subjected to greater scrutiny.

18 The third *Mathews* factor, the “Government’s interest, including the function involved and the  
19 fiscal and administrative burdens that the additional or substitute procedural requirement would entail”  
20 is minimal or nonexistent when considering how it could provide a meaningful hearing. *Mathews*, 424  
21 U.S. at 335. One would hope that the University administrator who sustained the interim suspensions  
22 reviewed, or was at least alerted to, *some* evidence before declining to lift the suspensions. Perhaps it  
23 was not necessary to allow for “live testimony, and the full panoply of trial-like procedures,” *Knight*, 60  
24 Cal. App. 5th at 870, which could entail substantial cost or logistical difficulties. But it is impossible to  
25 see how the University could claim that offering the students a short, written description of the evidence,  
26 or even a two-minute verbal explanation, would have imposed any significant administrative burden.

27 Even without performing a detailed *Mathews v. Eldridge* balancing test, it should be readily  
28 apparent that reliance on secret evidence in hearings with serious stakes is anathema to due process. The

1 “primary characteristic” of due process is “fairness.” *Doe v. Regents of Univ. of Cal.*, 28 Cal. App. 5th  
2 44, 46 (2018). It is unfair to bar students from their homes or prevent them from completing coursework  
3 or attending graduation – much less actually graduating – without telling them what evidence the  
4 University is relying on to determine that they committed misconduct and pose an ongoing threat to  
5 safety or of serious disruption. *See Kaur v. Holder*, 561 F.3d 957, 962 (9th Cir. 2009) (“the use of secret  
6 evidence is cabined by constitutional due process limitations. Although the Federal Rules of Evidence  
7 do not apply in administrative proceedings, we have long held that there are limits on the admissibility  
8 of evidence and that the test for admissibility includes fundamental fairness.”) (citation and quotation  
9 marks omitted) (holding that the “use of the secret evidence without giving [a petitioner] a proper  
10 summary of that evidence was fundamentally unfair and violated her due process rights.”).

11 If this were a criminal case, there would be no question that “fundamental fairness ensures that  
12 [all defendants] have access to the raw materials integral to the building of an effective defense.” *Pawlyk*  
13 *v. Wood*, 248 F.3d 815, 822 (9th Cir. 2001) (citation and internal quotation marks omitted). Those “raw  
14 materials” necessarily include at least an explanation of the evidence that supports the charges the  
15 defendant is facing. That this is not a criminal case does not change the basic truth that it is  
16 fundamentally unfair, not to mention unreasonable, to expect anyone, including student protesters, to be  
17 able to mount an effective defense if they don’t have any way of knowing the specific nature of the  
18 charges they are facing or anything about the evidence that might be used to substantiate those charges.  
19 Indeed, a purported hearing that withholds such information from the person being disciplined moots the  
20 question of what type of process is due, because such a hearing ultimately provides no more than a  
21 simulacrum of any sort of process at all.

### 22 **III. CONCLUSION**

23 When the University imposed the interim suspensions at issue in this case it violated its own  
24 rules and the plaintiffs’ due process rights in numerous ways. If allowed to stand, the sweeping nature of  
25 these suspensions and their indefinite duration threaten to chill the First Amendment rights not only of  
26 the suspended students, but also of their peers, who will be left to wonder when a University  
27 administrator might decide that their protected speech-related activities have crossed the unspecified and  
28 unmarked “boundaries of the forbidden areas,” *Grayned*, 408 U.S. at 109, and who may determine that

1 the only secure route to graduation is through self-censorship. For these reasons, amici respectfully  
2 request that this Court grant Plaintiffs’ motion for a stay of their interim suspensions.

3  
4 Dated: August 14, 2024

Respectfully submitted,

5  
6 AMERICAN CIVIL LIBERTIES UNION  
FOUNDATION OF SOUTHERN CALIFORNIA

7  
8 /s/ Jonathan Markovitz

Jonathan Markovitz (SBN 301767)

Peter Eliasberg (SBN 189110)

10 AMERICAN CIVIL LIBERTIES UNION  
11 FOUNDATION OF NORTHERN CALIFORNIA

12 /s/ Shaila Nathu

Shaila Nathu (SBN 314203)

Angelica Salceda (SBN 296152)

14 AMERICAN CIVIL LIBERTIES UNION FOUNDATION  
15 OF SAN DIEGO & IMPERIAL COUNTIES

16 /s/ Efaon Cobb

Efaon Cobb (SBN 282228)